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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1950.

No. .....

J. V. PEERSON, ***Petitioner,***

vs.

VIOLA MITCHELL, ***ET AL., Respondents.***

PETITION FOR WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

To the Honorable Fred M. Vinson, Chief Justice, or to any Justice of the Supreme Court of the United States:

Your Petitioner respectfully shows:

1. That he is plaintiff in error in appealed Case No. 34007 in the Supreme Court of the State of Oklahoma. That Viola Mitchell, as a judgment creditor of this petitioner, is the principal defendant in error, and certain other judgment debtors were also defendants in error. None of the other defendants in error appeared in the Supreme Court of Oklahoma or participated in anywise in that appeal, and they are not in anywise interested in this appeal. Appealed Case No. 34007 was appealed to the Supreme Court of Oklahoma by petitioner from a final appealable order entered by the District Court of Tulsa County, Oklahoma, in action No. 57580. (Tr. I-IV)

2. Action No. 57580 was instituted November 17, 1933, by Viola Mitchell, as plaintiff, against petitioner, R. F. Peerson and Grace Peerson, the father and mother of petitioner, and Hal Peerson, a brother of petitioner. (Tr. A2-A9) Viola Mitchell sought judgment in that action against the defendants jointly and severally for compensatory and punitive damages because of injuries she suffered when she was bitten by a dog while on the streets of the town where she lived. She alleged the dog was vicious and was owned and kept by defendants. R. F. Peerson, the father, answered, admitting ownership of the dog (Tr. A11-A14), and, along with all of the other defendants (Tr. A10-A11), also denied generally all other allegations in Viola Mitchell's petition. At the trial, the judge released the defendant, Hal Peerson, on his motion for directed judgment (Tr. A28), and refused to submit to the jury the matter of punitive damages but did submit the action to the jury on the matter of compensatory damages. March 22, 1935, the jury returned a verdict in favor of Viola Mitchell and against the remaining defendants, including petitioner, for the sum of Five Thousand Dollars ($5,000.00) (Tr. A25). Judgment was duly entered on such verdict effective as of the date of its return (Tr. A26-A28), and no appeal has been taken from that judgment.

3. Subsequently, Viola Mitchell made an effort to sell on execution the home wherein R. F. Peerson, Grace Peerson, petitioner, with other members of the family, lived, the title of which stood in petitioner's name. R. F. Peerson and Grace Peerson moved to quash the execution, and on hearing of such motion the District Court of Tulsa County found and held that petitioner's title to such real estate was a mere naked, legal title in trust for his parents and

further found and held that such property was the constitutional and statutory homestead of the parents and was exempt from sale to satisfy the judgment. (Tr. A222-A230) The findings and order so made are final.

4. Subsequently and on October 11, 1938, petitioner was adjudicated bankrupt in bankruptcy proceedings No. 3931 in the United States District Court for the Northern District of Oklahoma. Viola Mitchell filed claim therein on the basis of her judgment aforesaid and such claim was duly allowed against such bankrupt estate. In such bankruptcy proceedings, petitioner was given a discharge on November 25, 1938. (Tr. A129-A130)

5. April 19, 1947, Viola Mitchell caused alias execution to be issued against all of the judgment debtors and otherwise manifested an intent to enforce her judgment against petitioner. (Tr. A94-A96) Therefore, on November 28, 1947, petitioner filed in action No. 57580 a motion to require Viola Mitchell to release her judgment and to satisfy the judgment docket, the basis for such motion being the discharge in bankruptcy theretofore granted to petitioner. (Tr. A96-A99) Viola Mitchell filed response to such motion objecting to the allowance of the same "* * * because the judgment rendered in this action is a liability for a willful and malicious injury to the person of this plaintiff." (Tr. A103-A105) A full hearing on such motion and response was conducted at which hearing evidence of all of the proceedings in the action up to that time (Tr. A106-A235), including the testimony of all witnesses taken at the trial wherein the judgment was rendered, was introduced. (Tr. I-435) At the conclusion of the hearing, petitioner and Viola Mitchell each requested special findings of facts and conclusions of law, and submitted suggested forms

thereof. (Tr. 437-448) The trial judge made findings of fact and conclusions of law (Tr. 449-454) in effect denying petitioner's motion for the reason in particular that although petitioner was not the owner of the dog in question that petitioner permitted the dog to be kept and harbored on the premises owned by him, that the dog was vicious and petitioner had knowledge or was charged with knowledge of the vicious propensities of the dog, and such being the case the judgment, based on the verdict of the jury, against petitioner is "* * * a debt or liability incurred for 'willful and malicious injuries to the person * * * of another,' within the purview of the Bankruptcy Act (Title 11, Sec. 35, U. S. C. A.), and is a debt, by the terms of said Act not dischargeable or affected by a discharge in bankruptcy."

6. Such finding and order being appealable under Oklahoma procedure, petitioner appealed to the Supreme Court of Oklahoma, the appeal being docketed under the No. 34007 above mentioned. (Tr. I-IV) On December 19, 1950, the Supreme Court of Oklahoma rendered its decision by a divided court sustaining the order of the District Court of Tulsa County, Oklahoma. (Tr. 473A-473L) The petitioner filed a petition for rehearing with respect to such decision (Tr. 473M-473P), and the filing of such petition for rehearing, under applicable Oklahoma procedure, kept the decision of the Supreme Court of Oklahoma from becoming a final decision until such petition for rehearing was passed upon. On May 29, 1951, the Supreme Court of Oklahoma denied petitioner's petition for rehearing. (Tr. 473Q) That by reason of the foregoing, the decision of the Supreme Court of the State of Oklahoma, in Appeal Case No. 34007, is final and constitutes a decision against petitioner by the highest State Court within the State of Oklahoma, denying petitioner a substantial, beneficial right

or privilege or immunity specially claimed by him under Federal statute and decision.

7. A certified copy of the transcript filed in the Supreme Court of the State of Oklahoma in Appeal Case No. 34007 to which is attached and made a part (*1*) the decision of that court (Tr. 473A-473L), (*2*) the petition for rehearing (Tr. 473M-473P), and (*3*) the order denying the petition for rehearing (Tr. 473Q) above referred to is filed herewith. It is not necessary under the applicable procedure of the State of Oklahoma to print the transcripts or any pleadings filed in the Supreme Court of Oklahoma or any decision of that court and for that reason petitioner is unable to attach hereto a printed copy of such transcript but petitioner avers that he stands ready and willing to comply with the provisions of Rule No. 38(7) of the rules of the Supreme Court of the United States with respect to the printing of the record. For the reasons stated, petitioner is, at this time, unable to comply with Rule No. 38(3), requiring the service of a printed copy of the record upon Viola Mitchell, but avers his willingness so to do when he has complied with the directions of the court with respect to the printing of the record. Petitioner calls attention to the proof of service of this petition and other instruments appended at the close of this petition. In this connection, petitioner calls to the attention of the court that under applicable Oklahoma procedure, a true and correct copy of the typewritten transcript filed in the Supreme Court of Oklahoma has heretofore been served upon Viola Mitchell and that under applicable Oklahoma procedure Viola Mitchell has received a true and correct copy of the decision of the Supreme Court of Oklahoma, petitioner's petition for rehearing with respect thereto and the order denying such petition, by reason of which, when Viola

Mitchell has been served with this petition and its accompanying instruments other than the transcript, she will be in possession of all of the records and pleadings necessary to enable her to present her contentions with respect to this petition pending the printing of the record.

Statement Particularly Disclosing the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment and Decision in Question.

Petitioner states that this Court has jurisdiction to review the judgment and decision of the Supreme Court of the State of Oklahoma for the following reasons:

1. By virtue of the provisions of 28 U. S. C., Section 1257(3), because such court has denied petitioner a right or privilege or immunity granted to him under the Statutes of the United States, 11 U. S. C., Sec. 1, *et seq.*, and in particular Sections 32 and 35, specially set up by petitioner.

2. Petitioner states that the courts of the State of Oklahoma, including the Supreme Court of Oklahoma, the court of last resort of that state, have refused to accord full faith and credit to a judgment of the United States District Court for the Northern District of Oklahoma, granting petitioner a full, final and complete discharge from his debts, including the judgment of Viola Mitchell. See: *Myers* v. *International Trust Company,* 263 U. S. 64.

Questions Presented.

1. Petitioner's discharge in bankruptcy is a full, final and complete discharge and release of and from the judgment of Viola Mitchell under 11 U. S. C., Sec. 32.

2. The meaning, effect and application of the language used in 11 U. S. C., Sec. 35, reading, "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (Second) are liabilities * * * for wilful and malicious injuries to the person * * * of another, * * *," is a substantial Federal question and must apply uniformly throughout all states within the Federal jurisdiction.

3. The proper method for ascertaining whether a judgment is based on a liability for damages allegedly arising from the inflicting of "willful and malicious injuries to the person of another," when it is urged in opposition to a discharge granted in bankruptcy that the judgment is based on such a liability and was not discharged under 11 U. S. C., Section 35, is to inquire into the entire record whereon the judgment is based, including all of the evidence introduced.

4. When Viola Mitchell pleaded that such discharge did not affect her judgment, a substantial Federal question arose, and petitioner was entitled to show by the entire record, including the evidence whereon the judgment was based, that the judgment rendered against him did not come within the exception stated. See, *In re Lorde,* 144 Fed. 320.

5. The courts of Oklahoma, including the court of last resort, erroneously have refused to accord recognition to the rule adopted in the Federal Court that resort may be

had to the entire record, including the evidence whereon the judgment was based, to determine whether the judgment comes within the exception provided in 11 U. S. C., Sec. 35. See, *Baltimore & Ohio R. R. Co.* v. *Kepner,* 314 U. S. 44.

Reasons Relied on for Allowing the Writ.

Petitioner assigns the following reasons why the writ petitioned for should be allowed to consider the questions presented, as before outlined, to review the judgment of the courts of Oklahoma with respect to the substantial Federal question involved:

1. The meaning of "wilful and malicious injuries" contained in the Federal statute should have a uniformity of meaning and application through the Federal jurisdictions, and the procedure by which it can be determined whether a particular liability represented by a judgment involves an injury "wilful and malicious" in its origin should likewise be uniform. That is to say, it should not be permissible to determine the "wilful and malicious" nature of the injury in one state jurisdiction by reference to the complaint only, and in another state jurisdiction to determine the issue by reference to the judgment roll, and yet in another determine the issue by the entire record, which petitioner contends includes the evidence.

2. Further, a discharge in bankruptcy should afford equal protection throughout the Federal jurisdictions. A debtor in one state should not have benefits by virtue of his discharge that are denied to a debtor in another state under like circumstances, and especially where the denial thereof turns on nothing more substantial than differences in local procedure.

3. The Supreme Court of the United States has never passed on this particular substantial question, and should do so in order to bring uniformity in the decisions regarding this substantial Federal question.

4. The only Federal Court that has had an opportunity to pass on a similar set of facts wrote a decision from which petitioner thinks it is reasonably apparent that the Federal Judge resorted to the evidence introduced at the trial wherein the judgment was rendered, and upon consideration of such evidence held: A distinction exists between the act of the owner or custodian of a vicious dog who harbors such dog on premises occupied by him otherwise than the owner, and the act of the landlord or owner of the property who knows that the tenant harbors a vicious dog. It seems reasonably apparent from that decision that the Federal Judge was of the opinion that the owner of the dog would be guilty of maintaining a nuisance whereas the landlord would be guilty simply of negligence in failing to require the owner of the dog to abate the nuisance. See, *In re Lorde,* 144 Fed. 320.

5. The meaning, effect and application of the language of Sec. 35 aforesaid, establishing certain exemptions from the effect of a discharge in bankruptcy, a substantial Federal question, has been decided by the courts of last resort of some of the states in conformity with decision of Federal Court, *In re Lorde,* 144 Fed. 320, although the courts of last resort of some of the states, including Oklahoma, hold to the contrary and there is thus a conflict in the decisions among the courts of last resort of the several states on a substantial Federal question. See, *People* v. *United States,* 328 U. S. 8.

6. Further, the Supreme Court of Oklahoma has not

always been consistent in its rule of law upon this particular issue of Federal law. Earlier that court held that the ownership of a known vicious dog was legal and that the liability for injury to another sounded in negligence for failure to properly restrain the animal. Under such a rule, petitioner would have the full benefit of his discharge in bankruptcy. Later cases by the Supreme Court of Oklahoma tend to indicate that the liability arises from a nuisance from the wilful and malicious act of keeping a known vicious animal. Under such a holding, the Supreme Court of Oklahoma would deny petitioner the benefit of his discharge in bankruptcy. The last decision of the Supreme Court of Oklahoma, prior to the present decision sought to be reviewed, reverted again to the earlier holding and clearly said that the owner's liability sounded in negligence for failure to restrain an animal of known vicious propensities. Thereunder petitioner would have full protection of his discharge in bankruptcy. In the present decision, for which review is sought with respect to the Federal issues, the court made no reference to its last prior holding with the result that petitioner is now denied the benefit of his discharge in bankruptcy. This Court should determine this Federal issue in order to bring uniformity in the benefits accorded to discharged bankrupts in Oklahoma.

7. A resort to the petition of Viola Mitchell (Tr. A3) as well as the testimony of Viola Mitchell (Tr. A27-A32) and of her daughter, Elizabeth (Tr., 65), in this case will disclose that the injuries which Viola Mitchell suffered were not the result of the "wilful and malicious" act of petitioner in harboring the dog on the premises or permitting the dog to be harbored on the premises, for Viola Mitchell was attacked by the animal on the public streets of the town. Therefore, the injury, if any, resulted from the negligent

failure of the owner of the animal to properly restrain the animal on the premises. The District Court of Tulsa County expressly found that petitioner was not the owner of the dog but did permit the owner to keep the animal on the premises, the mere naked legal title of which stood in petitioner's name.

8. The manner in which the trial court submitted the issues of law on the evidence introduced requires resort to the evidence to ascertain whether petitioner's liability is in fact based on "willful and malicious injuries to the person" of Viola Mitchell or simply on negligence. The trial judge, in the recent hearing on petitioner's motion to require a release of the judgment, found from an examination of the evidence that petitioner was not the owner of the dog. (Tr. 452). By instructions (Tr. A20-A21) the trial judge submitted to the jury the issue of petitioner's liability if he was the keeper of the dog. If the evidence would sustain such a finding, then it is Viola Mitchell's contention that judgment against petitioner on such liability was not dischargeable. By an instruction (Tr. A22) the trial court submitted to the jury the issue of petitioner's liability if he "* * * did permit said * * * dog to be kept and harbored at his home; * * *," with knowledge of its vicious nature, and we believe that our contention is unchallenged that liability under evidence of this type would make the judgment dischargeable as not being within the exception. Therefore, since the ultimate issue of petitioner's liability was submitted to the jury on both rules of law, it is imperative that resort be had to all of the evidence to see whether petitioner's liability was or was not discharged in bankruptcy.

Supersedeas.

Petitioner desires this appeal by way of writ of certiorari to be a supersedeas and avers his willingness in good faith to try to comply with such order as the court may make with respect thereto.

Wherefore, petitioner prays for the allowance of a writ of certiorari to be directed to the Supreme Court of the State of Oklahoma in order that the decision of the Supreme Court of the State of Oklahoma in appealed case No. 34007, *J. V. Peerson, plaintiff in error,* v. *Viola Mitchell, et al., defendants in error,* may be examined and reversed, and prays that proper order be made touching supersedeas and the stay of mandate of the Supreme Court of the State of Oklahoma and the stay of further proceedings in the courts of the State of Oklahoma pending this appeal.

.....,

THEODORE RINEHART,

.....,

HAROLD C. STUART,

.....,

HARRY D. MORELAND,

1510 Nat'l Bank of Tulsa Bldg.,
Tulsa 3, Oklahoma,
Attorneys for Petitioner, J. V. Peerson.

Of Counsel:

E. J. DOERNER,

JACK E. CAMPBELL,

1510 National Bank of Tulsa Bldg.,
Tulsa 3, Oklahoma.

FILE
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CHARLES ELMORE

No. 278

In the Supreme Court of the United States

October Term, 1951.

J. V. PEERSON, *Petitioner,*

vs.

VIOLA MITCHELL, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma.

BRIEF FOR RESPONDENT IN OPPOSITION.

S. J. Clendenning,
Tulsa, Oklahoma,

A. L. Emery,
Okmulgee, Oklahoma,

Attorneys for Respondent.

September 28, 1951.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1951.

No. 278

J. V. PEERSON, *Petitioner,*

vs.

VIOLA MITCHELL, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION.

Jurisdiction.

The opinion of the Supreme Court of Oklahoma was entered on December 19, 1950 (not yet reported in either the State Reports or the Pacific Reporter). The petition for rehearing was denied May 29, 1951. The petition for writ of certiorari was filed August 25, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3) and 11 U. S. C., Sections 32 and 35.

Statement.

In order that this Tribunal may, with less effort, notice the record, the respondent prefers to state it in chronological order rather than correct the erroneous statements in the petition.

The respondent commenced this action by filing her petition in the District Court of Tulsa County, Oklahoma, against the petitioner (J. V. Peerson) and his parents (R. F. and Grace Peerson) in damages, both compensatory and

punitive, for injuries caused by being bitten by a vicious, dangerous dog; that the dog was kept by the defendants, was allowed to run at large upon the public streets and alleys all hours of the day and night; that: "the said dog became, and was, a public nuisance and a common enemy to mankind"; and that the defendants were aware of the dangerous nature of said dog (Tr. 3-6). The petitioner and his mother filed a general denial (Tr. 7); but, the father, in his separate answer, admitted he owned the dog (Tr. 7).

The evidence on the part of the respondent was, the dog was not kept at any particular place but was allowed to run at large (Tr. 19). The evidence of R. F. Peerson (father), Grace (mother), J. V. (petitioner), Hal (adult son), and Robert (minor son) was the dog was kept at the barn lot by the father—*the evidence was positive the dog was not kept and was not allowed around the residence occupied by the Peerson family;* and the evidence of all the defense witnesses: Garland Jesse, Mary Osborn, A. J. Brown, Claude Bailey, Frank Gregory, Mrs. Ella Thompson, Brice Sharpensteen, Ezra Johnson and Stiller Ramey, was the dog was kept by the father at his barn lot. The last six witnesses were not listed by petitioner in his designation—they were listed by respondent.

The Supreme Court of Oklahoma in *Tidal Oil Co.* v. *Forcum, et al.,* 189 Okl. 268, 116 P. (2d) 572 (1941), held:

> "Under the common law, which governs the instant action, the gist of the action for injury by a dog known by its owner or keeper to be vicious is generally said to be not negligence in the manner of keeping the dog, but the keeping of it. *The action is founded upon the maintenance of a nuisance.* (*Ayers* v. *Macoughtry,* 29 Okl. 399, 117 P. 1088, 37 L. R. A. (NS) 865, cited in *Tubbs* v. *Shears,* 55 Okl. 610, 155 P. 549, 3 C. J. S. 1256,

2 Am. Jur. 731.) *And whether the keeper owned the dog is immaterial.* (*Harris* v. *Williams*, 160 Okl. 103, 15 P. (2d) 580)." (Tr. 53) (Italics respondent's.)

The trial court gave, among others, the following instruction:

> "You are instructed that a person who owns or harbors and keeps, or owns and harbors and keeps, a dog, is liable for injury that such dog may commit upon the person of another, if such owner or keeper knew, or with the exercise of ordinary care should have known that such dog was of a vicious or dangerous nature to the kind of injury inflicted." (Tr. 9)

On March 20, 1935, the jury returned its verdict in favor of respondent against the petitioner and his parents and fixed the amount of her damages at $5,000.00 (Tr. 11). And, on the same day, judgment was rendered on the verdict (Tr. 11, 12). A motion for a new trial was denied but there was no appeal.

On October 7, 1938, the petitioner filed his petition in bankruptcy—in which petition he listed no assets and only one debt which was the judgment of respondent; and, he paid into court only enough money to pay the costs of the bankruptcy proceedings (Tr. 17). Notice thereof was served on respondent; and, thereupon, she submitted to the jurisdiction of the bankruptcy court and filed her claim, based on her judgment, as she was ordered to do; but, she did *not* do anything further—*she did not protest or object to his discharge* (Tr. 16, 17). His discharge, dated November 25, 1938, reads, in part:

> "It is therefore ordered by the court that the said John Vol Peerson be discharged from all debts and claims which are provable by said Acts (of Congress) against his estate, and which existed on the 7th day

> of October, 1938 * * *; excepting such debts as are by law excepted from operation of a discharge in bankruptcy."

The discharge appears at page A129 in the certified transcript from the Supreme Court of Oklahoma but does not appear in the printed record in this Tribunal. 11 U. S. C., Section 35, reads, in part:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * * except such as * * *; (*second*) are liabilities * * * for willful and malicious injuries to the person * * * of another * * *."

At the time of his discharge (November 25, 1938), two courts had rendered opinions in dog bite cases involving discharges in bankruptcy: *In re Lorde* (1906), in Bankruptcy, 144 Fed. 320, and *Humphrey's* v. *Heller,* (1935) 283 N. Y. S. 915. In the former, the bankrupt did *not* own or keep the dog. The bankruptcy court held in the syllabus:

> "A judgment against a landlord for a personal injury inflicted by a vicious dog owned by a tenant and kept on leased premises is not one for a 'willful and malicious injury to the person' within the meaning of Bankr. Act * * * but is based on negligence only, and the debt is one for which the defendant is released by a discharge in bankruptcy."

In the body of the opinion, the court said:

> "But a cause of action against the landlord is not for maintaining a nuisance, but for negligence in not taking some steps to abate the same."

In the latter case, the bankrupt owned and *harbored* the dog. The New York court said:

> "The complaint alleges that the defendant 'wrongfully kept a dog, well knowing him to be ferocious and

mischievous disposition and accustomed to attack and bite mankind.' It is clear the cause of action asserted is within the category of a malicious and willful injury as that term is employed in the Bankruptcy Act. See *Tinker* v. *Colwell,* 193 U. S. 473, 24 S. Ct. 505, 48 L. ed. 754; *Kavanaugh* v. *McIntyre,* 210 N. Y. 175, 104 N. E. 135 (affirmed 242 U. S. 138, 37 S. Ct. 38, 61 L. ed. 205); *Bank of Williamsvi le* v. *Amherst Motor Sales, Inc.,* 234 App. Div. 261, 254 N. Y. S. 825.

"Negligence in the ordinary sense is not the gravamen of the action. (*Carlisle* v. *Cassasa,* 234 App. Div. 112, 116, 254 N. Y. S. 221; *Muller* v. *McKesson,* 73 N. Y. 195, 29 Am. Rep. 123; *McFarland* v. *City of Niagara Falls,* 247 N. Y. 340, 349, 160 N. E. 391, 57 A. L. R. 1; the action is predicated upon a willful and intentional act, namely the keeping of a ferocious animal with knowledge of its viciousness. In this aspect, as a matter of law, the willful and malicious character of the act is implicit in the cause of action asserted. It is immaterial that the complaint does not allege that the act was willful and malicious. *Cf. In re Dutkiewicz,* (D. C.) 27 F. (2d) 334. The court is not concluded by the form of the action or the allegations of the complaint; resort may be had to the entire record to determine the essential character of the act. *Bank of Williamsville* v. *Amherst Motor Sales, Inc,, supra.*

"The case of *In re Lorde,* (D. C.) 144 F. 320, does not indicate a contrary conclusion; indeed, it is an assumption of the court that the debt would not be dischargeable as against the owner of the dog.

"Accordingly, the motion for a stay of the proceedings is denied."

Following the discharge of petitioner, the New York court, in two cases, again determined the legal questions contrary to the contentions of petitioner. In *Yackel* v. *Nys,* 16 N. Y. S. (2d) 545 (1939), judgment had been rendered

in favor of an infant, by her guardian *ad litem,* against the owners and keepers of a dog for damages for the injuries inflicted upon her by the dog. After defendant's discharge in bankruptcy, he moved, in the court of original jurisdiction, to stay garnishee execution against his wages. The motion was denied and, in support thereof, the court quoted the following from *Tinker* v. *Colwell,* 193 U. S. 473, 487, *supra*:

> "A willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception."

The New York court then closed with the following:

> "The appellant further claims that he was not guilty of wrongful and malicious injury since, at most, he merely harbored the dog and he cites the case of *In re Lorde,* D. C., 144 F. 320. That case is distinguishable on the facts. Lorde neither owned nor harbored the dog. It was owned and harbored by a tenant in his apartment house. The court held that Lorde, at most, was guilty of negligence only that he had failed to remove the dog from his premises, and that the judgment rendered against him was dischargeable because the element of willful and malicious injury was lacking."

The bankrupt's motion to stay execution was denied. The other case is, *Beam* v. *Karain,* 47 N. Y. S. (2d) 193 (1944). A judgment had been rendered in favor of an infant, by her guardian *ad litem,* for injuries sustained when bitten by a dog owned and harbored by defendants. After discharge in bankruptcy, the defendant filed a motion in the court of original jurisdiction to stay execution proceedings. In affirming the order denying the motion, the court said:

"In determining whether the judgment in question was based upon 'wilful and malicious' injury, we are limited to an examination of the complaint upon which the judgment was obtained. The evidence presented at the trial is not available. According to the allegations contained in such complaint, the theory upon which plaintiff's cause of action was based was that the defendant 'unlawfully kept a German police dog, well knowing him to be ferocious, vicious and mischievous disposition and accustomed to attacking and biting mankind.'

"Therefore, the gist of plaintiff's action was the keeping of the dog with knowledge of its vicious propensities."

And the Supreme Court of Oregon in *Jaco* v. *Baker,* 174 Ore. 191, 148 P. (2d) 938, (1944) determined the legal questions, again contrary to the petitioner. Again the action was filed by an infant, by her guardian *ad litem,* against a husband and wife and son for injuries suffered by being bitten by a dog owned and kept by defendants. In the answers the son admitted he owned and kept the dog, but the parents filed a general denial. Judgment was against all of the defendants as the keepers of the dog. All three defendants obtained discharges in bankruptcy, and each defendant filed a motion in the court of original jurisdiction for an order on the clerk to enter satisfaction of the judgment. After quoting from *Tinker* v. *Colwell,* 193 U. S. 473, *supra,* and *McIntyre* v. *Kavanaugh,* 242 U. S. 138, *supra,* and other cases, the court concluded:

"The action is predicated upon a willful and intentional act, namely, the keeping of a vicious dog with knowledge of its viciousness. In this aspect, as a matter of law, the willful and malicious character of the act is implicit in the cause of action asserted. No recovery at all could be had without proof of the keep-

ing by defendants of such an animal with knowledge of its vicious propensities,''

following the New York cases. The defendants had insisted upon an examination of the evidence in order to determine the willful and malicious character of the act, citing automobile and other cases; and, in answer thereto, the court said:

> ''In these automobile cases the willful and malicious character of the act is not 'implicit in the cause of action asserted' as in the case of keeping a vicious animal knowing its vicious propensity. The same distinction obtains between the case at bar and the following cases cited by defendants: * * *.''

The orders denying the motions of the bankrupts were affirmed.

In the case at bar, in 1947, the respondent caused execution to issue out of the court of original jurisdiction and to be levied on property of the petitioner in Tulsa, Oklahoma; and, thereupon, the petitioner filed his motion in the aforesaid court to require respondent to release judgment (Tr. 15). To which motion the respondent filed her response (Tr. 16, 17). Upon the hearing, the pleadings, instructions, verdict, judgment, and transcript of the evidence were introduced in evidence. The trial court examined all thereof, including the evidence, and concluded (Tr. 60):

> ''1. The judgment in this action rendered against J. V. Peerson is a judgment for keeping and harboring a dog known to him to be a vicious character prior to the time of the injuries sustained by plaintiff from the attack made upon her by said dog.''
>
> ''2. Such judgment is a debt or liability incurred for 'willful and malicious injuries to the person * * * of another,' within the purview of the Bankruptcy Act

(Title 11, Sec. 35, U. S. C. A.), and is a debt, by the terms of said Act, not dischargeable or affected by a discharge in bankruptcy."

And the trial court denied the motion of petitioner (Tr. 61).

On appeal, the aforesaid order of the trial court was affirmed. The respondent will not quote from the opinion of the Supreme Court of Oklahoma because it is printed in full in the Transcript of Record (pp. 63 to 70) and will be read by this Honorable Court. Like the New York and Oregon courts, the Supreme Court of Oklahoma did not follow *In re Lorde* because it was not applicable—Lorde was *not* the keeper of the dog; the petitioner *was* the keeper of the dog. In none of the decisions did any of the State Appellate Courts recognize any conflict with *In re Lorde;* and, therefore, it cannot be said (and petitioner does not claim) there is a conflict between the State decisions and that of *In re Lorde.* Hence, the petitioner does not ask this Tribunal to solve any such conflict.

An answer to, "Statement Particularly Disclosing the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment and Decision in Question."

1. The petitioner claims he has been denied "a right or privilege or immunity granted to him" by Federal Statutes, but such rights, privileges, and immunities are not any greater than those granted to him as a bankrupt under 11 U. S. C., Sections 32 and 35, and as expressed in his discharge, that is to say, he was discharged from all debts and claims "excepting such debts as are by law excepted from operation of a discharge in bankruptcy." Since the question (whether respondent's judgment was an exception) was determined in a manner determined by Federal

Law, then petitioner cannot complain about being denied any of his rights. In *Teubert* v. *Keasler,* 296 Fed. 472 (1924, C. C. A. 3), the court said:

> "The right of a bankrupt to discharge under Bankruptcy Act, Sec. 14 (Comp. St., Sec. 9598) and its effect under Section 17 (Comp. St., Sec. 9601) are wholly distinct propositions, and the latter question cannot properly arise or be considered in determining the right to discharge, but should be determined when it is interposed as a defense to the enforcement of a claim."

This difference was noted by this Honorable Court in *Friend* v. *Talcott,* 228 U. S. 27, 40, 41. And in *Greenfield* v. *Tuscello,* 129 F. (2d) 854 (1942), the court said:

> "The question is whether the liability of Greenfield was for 'willful and malicious' injuries. Such injuries have been defined by the Supreme Court as arising from an act involving a 'willful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally.' *Tinker* v. *Colwell,* 193 U. S. 473, 487, 24 S. Ct. 505, 509, 48 L. ed. 754. See *McIntyre* v. *Kavanaugh,* 242 U. S. 138, 37 S. Ct. 38, 61 L. ed. 205. We think the issue of fact should be tried out in the State Court after the determination of the discharge and that until then the stay originally granted should stand. This is the most approved practice except in cases where special embarrassment arises from such procedure. *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 53 S. Ct. 695, 78 L. ed. 1230, 93 A. L. R. 195; *In re Byrne,* (2d Cir.) 296 F. 98."

Collier on Bankruptcy, 14th ed., p. 1657, Sec. 17.28, cited nine Federal cases in support of the above rule; and, in his 1948 Supplement, p. 175, he cited a number of additional Federal cases. The question was determined in the manner

provided by Federal law; and, therefore, the petitioner has not been denied "a right or privilege or immunity granted to him by Federal law."

2. The petitioner contends the courts of Oklahoma have refused to accord "full faith and credit * * * to his discharge" and cites in support thereof *Myers* v. *International Trust Co.*, 263 U. S. 64. The citation is far-fetched—the International Trust Company had opposed an offer of composition before the referee in bankruptcy; the referee approved it and his action was confirmed by the District Court; and, on appeal, the order confirming the composition was affirmed. *International Trust Co.* v. *Myers,* 245 Fed. 110, 112, 157. Later, the International Trust Company filed action in damages, in tort, against Myers for the same amount; Myers interposed *res adjudicata* and offered in evidence "the record of the bankruptcy judgment on the composition," which was excluded. This Honorable Tribunal held against the former bankrupt on the question of *res adjudicata* but held the State court erred in excluding from evidence the record in the bankruptcy court, and that such exclusion was a question whether full faith and credit was given a judgment of a Federal Court. In the case at bar, respondent filed her claim in the bankruptcy court but she did nothing more—she did not object to petitioner's discharge; and, there was no exclusion in the State court of any order, judgment or record of the Federal Court in bankruptcy. The petitioner's discharge was received in evidence and considered by the trial court in connection with the entire record, including the evidence, and was again considered in the Supreme Court of Oklahoma in connection with the judgment roll; and, therefore, the cited case has no application whatever in the case at bar.

An answer to, "Questions Presented."

1. The petitioner discharge *is* a release of respondent's judgment—

2. *Unless* the judgment is a liability for a willful and malicious injury to her person; but the petitioner does not cite any Federal law in support of his contention that the question must be solved uniformly throughout all of the States nor that the question was not solved by the Oklahoma courts in conformity to Federal law.

3. The petitioner insists that the proper method to determine the question is "to inquire into the entire record whereon the judgment is based, including all the evidence introduced." As stated above, the trial court complied entirely with the demand of the petitioner and found from all the evidence contrary to petitioner, but the Supreme Court of Oklahoma did not inquire into the evidence for the reasons stated in the opinion—and the reasons given were based on State law, not Federal.

4. The petitioner further insists that the question is substantially Federal and that he was entitled to show, by the evidence, that the judgment against him did not come within the exceptions, citing *In re Lorde,* 144 Fed. 320—which case did not determine the question.

5. The petitioner insists that the Oklahoma courts have refused to accord recognition to the Federal rule that resort must be had to the entire record, including the evidence, citing *Baltimore & Ohio R. R. Co.* v. *Kepner,* 314 U. S. 44. Again the decision is far-fetched; and again the petitioner cites the case without quoting therefrom; and again the petitioner expects this Honorable Court to ex-

amine the opinion and look for some expression therein that supports petitioner's contentions. This case did not involve any question of evidence; it involved the power of a State court of equity to enjoin the prosecution of an action in the Federal courts. The question involved was stated by this Tribunal as follows:

> "Action by the Baltimore & Ohio Railroad Company against Frederick S. Kepner to enjoin the defendant's continued prosecution of a suit in the United States District Court for the Eastern District of New York under the Federal Employers' Liability Act. To review a judgment of the Supreme Court of Ohio, 137 Ohio St. 206, 28 N. E. (2d) 586; 137 Ohio St. 409, 30 N. E. (2d) 982, affirming a judgment dismissing the action, the plaintiff brings certiorari."

Mr. Justice REED, speaking for the court, said:

> "We have for decision in this case the question whether a state court may validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, *et seq.*, in a Federal court in another state where that Act gave venue, on the ground that the prosecution in the Federal court is inequitable, vexatious and harassing to the carrier."
>
> "As the issue was deemed a federal question, undecided by this court, *and concerning which there was a lack of uniformity in the state court decisions* certiorari was granted, 312 U. S. 671, 61 S. Ct. 621, 85 L. ed. 1113, the decree below was affirmed by an equally divided court, 313 U. S. 542, 61 S. Ct. 841, 85 L. ed. 1510, and the petition for rehearing was allowed, 313 U. S. 596, 61 S. Ct. 939, 85 L. ed. 1550." (Italics respondent's.)

The decision of the Supreme Court of Ohio was again af-

firmed with Chief Justice STONE and Justices FRANKFURTER and ROBERTS dissenting. In the Ohio case, there was a lack of uniformity in the state courts as to the power of a state court of equity to enjoin the prosecution of a case in the Federal courts; but, in this Oklahoma case, there is no conflict—the Supreme Court of Oregon followed the New York cases; and the Supreme Court of Oklahoma followed the New York and Oregon cases—and all of the state courts refused to follow *In re Lorde* because it was not applicable. Hence, there is no conflict in the State decisions and, therefore, no reason to grant certiorari. Again, the cited case has no application.

An answer to, "Reasons Relied on for Allowing the Writ."

1. The petitioner contends the meaning of the phrase "willful and malicious injuries" should have a uniform meaning throughout the Federal jurisdiction and the procedure by which such meaning is determined should also be uniform; and the petitioner complains that the meaning is determined in one state by reference to the complaint only, and in another state by reference to the judgment roll; and in another state by reference to the entire record, including the evidence. The argument of petitioner is misleading. In no state, in a dog bite case, did the court consider the evidence. In the case at bar, the petitioner had the entire record, including the evidence, and he is not in a position to complain that in New York (*Beam* v. *Karain, supra*) the court had only the complaint. In all of the State cases, the determination of the meaning of the phrase was made on the authority of two decisions by this Tribunal—*Tinker* v. *Colwell, supra,* and *Kavanaugh* v. *McIntyre, supra,* —so the meaning of the phrase is uniform throughout the Federal jurisdiction. And, the procedure is uniform, be-

cause in all of the state dog-bite cases, the determination was made in the courts of original jurisdiction, exactly in the manner stated in the Federal decisions.

2. The contention that a discharge should afford equal protection throughout the United States and the petitioner should not be denied the benefits of his discharge because of the difference in local procedure is without foundation because the procedure followed in Oklahoma and New York and Oregon is the procedure announced by the Federal courts.

3. It is true, the Supreme Court of the United States has not passed upon this particular question but the state courts have determined the question based on two decisions of this Tribunal defining "willful and malicious" injuries to the person. If this Court should take jurisdiction in every case wherein the identical question has never been determined, there would be no end to litigation in this Tribunal.

4. The contentions in this paragraph are based entirely on *In re Lorde.* Throughout all the proceedings, in the trial court and in the Supreme Court of Oklahoma, all of the contentions of the petitioner have been that his motion is ruled by *In re Lorde;* but, in order for the Oklahoma courts and for this Tribunal to apply *In re Lorde,* it is necessary to find from the evidence that the petitioner was *not* a keeper of the dog and this finding of fact is contrary to the verdict of the jury and the judgment of the trial court in the original trial and the order of the trial court in denying petitioner's motion.

5. The contention that some of the states have determined the question herein in conformity with *In re Lorde*

is entirely erroneous—*the petitioner does not name any such State.* New York, Oregon and Oklahoma simply held *In re Lorde* does not apply. The citation of *People* v. *United States,* 328 U. S. 8, is again far-fetched; and, again, the petitioner does not quote from the opinion to show it is applicable; and, again, the petitioner expects this Honorable Court to read the decision and find therein some expression that is applicable. Mr. Justice BLACK delivered the opinion of the court and therein he stated:

> "In this case the Supreme Court of Illinois held that certain tax claims of the federal government against the insolvent taxpayer must be satisfied in full before the State of Illinois can recover the amounts due as taxes under its Unemployment Compensation Act. * * * This decision is substantially in conflict with that of the Supreme Court of Rhode Island * * *."

And this Honorable Court held:

> "The United States Supreme Court would grant certiorari to resolve a conflict between the decisions of the Supreme Courts of different states with respect to priority of payment as between tax claims of federal government against insolvent taxpayers and claims for taxes under its Unemployment Compensation Act."

In the case at bar, there is no such conflict between the decisions of the Supreme Courts of New York, Oregon and Oklahoma. Again, the citation has no application.

6. In this paragraph, the petitioner wants this Tribunal to solve a conflict in the decisions of the Supreme Court of Oklahoma—the contentions are based on an erroneous statement of both law and fact. The court has always adhered to the theory of a nuisance as shown in the citations herein on page 2 and in the decision in the case at bar.

7. The contentions herein concern questions of fact; and the last sentence is an entirely erroneous statement. Under the laws of Oklahoma, the jury was not authorized to return its verdict against the petitioner unless the jury found, as a fact, he *was* a keeper of the dog—and the jury so found.

8. The last contentions of the petitioner remove every lingering doubt that the petition is submitted to this Honorable Court on questions of facts, only. The petitioner contended in the trial court, in the Supreme Court of Oklahoma, and again in this Court that there were two issues submitted to the jury: Whether the petitioner was a keeper of the dog on the theory of a nuisance and whether he was negligent in not requiring his father (the owner) to remove the dog from the residence of the family—and the petitioner contends an examination of the evidence is necessary in order to determine his contentions. Just about half of the printed Transcript of Record contains evidence which he requests this Tribunal to examine. The Oklahoma Supreme Court disagreed with petitioner that the case was submitted to the jury on two theories. In her petition, the respondent alleged the defendants "were keepers" of a known "vicious, dangerous" dog and they "allowed the said dog to run at large" and that the said dog was "a public nuisance and a common enemy of mankind." The petitioner filed a general denial. Hence, there was only one issue tendered by respondent and only one issue joined by petitioner. Under the law of Oklahoma, the gist of the action is the keeping of a known vicious dog which constitutes a nuisance (whether the keeper owned the dog is immaterial) (Tr. 53,

66). Hence, on the issues raised by the pleadings, the sole and only issue submitted to the jury, under the instructions of the court, was whether the petitioner was a keeper of a known vicious dog; and the jury so found and judgment was rendered accordingly. *Now, sixteen years later, the petitioner wants this Tribunal to re-examine the evidence and find the facts contrary to the verdict of the jury.*

Summary and Conclusion.

The petitioner has endeavored to show four legal reasons why this Tribunal should grant a writ of certiorari.

He cited *Myers* v. *International Trust Company, supra,* wherein the state court refused to admit in evidence a bankruptcy record of a composition and thereon he based his contentions the Oklahoma courts refused to accord full faith and credit to his discharge; but his discharge was received in evidence and considered in connection with the judgment roll—the procedure was not outlined by the Federal courts. The cited case has no application.

He cited *Baltimore & Ohio Railroad Co.* v. *Kepner, supra,* wherein this Tribunal held the Ohio State court of equity could not enjoin the prosecution of an action in a Federal court of another state under the Federal Employers' Liability Act; but, this case is cited by petitioner in support of his contentions the Oklahoma Supreme Court erred in not resorting to the entire record, including the evidence. The cited case involved the question of jurisdiction—not evidence—and has no application.

He cited *People* v. *United States, supra,* in which case this Tribunal solved a conflict in the decisions of Illinois

and Rhode Island involving the payment of Federal taxes; but, there is no conflict in the decisions of New York, Oregon and Oklahoma and the petitioner does not claim there is a conflict; and neither does he claim there is a conflict between the foregoing State decisions and *In re Lorde*. Hence, the cited case has no application.

He cited *In re Lorde*—the State courts all hold this decision does not apply because Lorde was not the keeper of the dog, whereas, the bankrupts, in all of the States cases, were keepers of the dogs. The cited case does not apply.

Hence, the petitioner has not advanced any legal reason for a writ of certiorari.

The decision of the Supreme Court of Oklahoma rests upon State grounds—not Federal. The Supreme Court of the United States will not grant certiorari where the judgment of the State court is based on non-federal grounds adequate to support it. *Carpet, Linoleum & Resilient Decorators Union, et al.*, v. *Dayton Co.*, 339 U. S. 906; *Young* v. *Ragen*, 337 U. S. 235.

Certiorari will not be granted where there is a want of a substantial Federal question. *Washington, ex rel.*, v. *Superior Court*, 339 U. S. 907; *Standard Dredging Corp.* v. *Louisiana, ex rel.*, 339 U. S. 907.

This Honorable Court will not determine questions of fact. In *United States* v. *Johnston*, 268 U. S. 220, 227, this Tribunal said: "We do not grant a certiorari to review evidence and discuss specific facts." In *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178, this Tribunal held: "Granting of the writ would not be warranted to review the evidence or inference from it." To the same effect,

Southern Power Co. v. *N. C. Public Service Co.*, 263 U. S. 508.

The respondent submits the writ of certiorari should not be granted; and the petitioner has not shown any legal reason why it should be granted.

Respectfully submitted,

S. J. CLENDINNING,
Tulsa, Oklahoma,

A. L. EMERY,
Okmulgee, Oklahoma,

Attorneys for Respondent.

September 28, 1951.